(15)

No. 96-1581

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.
YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and
SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CHARLES MIX COUNTY, SOUTH DAKOTA, *AMICUS CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

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INTEREST OF *AMICUS CURIAE*

The vital concern that prompts the filing of this *Amicus* Brief can be simply stated. Prior to this litigation, all the courts and parties had recognized that the 1858 Yankton reservation no longer existed. Now, a century later, more than half of the area of Charles Mix County, South Dakota, is at issue. Consequently, the approximately 6,000 people that reside there presently face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this takes place, their officials would have only limited jurisdiction and the non-members would have no elected voice in the governance of their affairs and property by the Yankton Sioux Tribe.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. This is a county that has a significant rural farm population. In terms of agricultural productivity, the land consistently produces above average yields on a state-wide basis. Approximately ninety-eight percent (98%) of the acres in Charles Mix County are classified as farm land. This farm land has an above average valuation and an above average assessed dollars per acre worth. *Ninety* percent of the land is owned by non-members and over *two-thirds* of the residents are non-members who reside on these small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See* Brief for the Cities as *Amici Curiae*. In all, there are forty-nine (49) political subdivisions within the county.

Although this Court has repeatedly recognized in this situation, that the justifiable expectations of the people should not be lightly regarded or simply swept aside, the panel majority ignored that prudential advice. *Hagen v. Utah*, 510 U.S. 399, 421 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977). For these reasons, the issue here is of grave importance to the residents and governments of Charles Mix County, South Dakota.

By contrast, here, as in *Hagen*, it is also important to restate what is not at issue. *Hagen*, 510 U.S. at 421. The Indian trust lands and the seat of the Yankton Sioux tribal government situated on Indian trust lands ("tribal headquarters area at Marty") are not at issue. *State v. Greger*, 559 N.W.2d 854, 859 n.4 (S.D. 1997), Pet. App. at 135. *See also* Cities Pet. Brief at 7 n.1 (Marty).

The Supreme Court of the State of South Dakota subsequently considered the identical disestablishment question in *State v. Greger*, Pet. App. at 125. In a unanimous opinion, the State Supreme Court rejected the views of the panel majority and reaffirmed the longstanding position that the Yankton reservation was disestablished. The County would submit that the views of the State Supreme Court are more in line with the principles formulated by this Court, principles that should have been controlling here.

Importantly, this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

SUMMARY OF ARGUMENT

The County fully supports the arguments set forth in the Brief of the State of South Dakota. The County further agrees that the decision of the panel majority conflicts substantially with the relevant decisions of this Court. This brief will focus on that conflict and the role of the United States in the entire process.

A fair reading of *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v.*

Utah, 510 U.S. 399 (1994), clearly undermines the views set forth by the panel majority. The State highlights these important principles and, for that reason, they will not be repeated here.

In addition, however, a proper perspective regarding the history of disestablishment litigation before this Court is important in order to accurately assess the views of the panel majority and the dissent in conjunction with the principles set forth in these decisions. This brief is intended to serve that purpose and provide that perspective. The County starts with a brief review of the primary arguments presented and rejected in each case decided by this Court, as well as the historic perspective available or established at the time.[1] Such a review advances three overriding themes.

First, as one would expect, each time the Court was presented with this issue, more primary sources were available from which a proper historical perspective could be reconstructed and the intent of Congress more conclusively ascertained. The opinions reflect this documentation.

Second, the views of the United States are especially noteworthy. The United States rarely fails to advocate the resurrection of original reservation boundaries, presumably because of a perceived obligation to support the tribal position. The shifting, but very sophisticated, arguments of the United States (for the most part repeatedly rejected by this Court) have mainly served to perpetuate

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[1] This brief does not address the decision of this Court in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985) in detail, only because it is not truly a disestablishment case. However, *Oregon* does involve a cession agreement and the *Oregon* opinion sheds considerable light on understanding the cession process. The Supreme Court of South Dakota in *Greger* cited and discussed *Oregon* in several instances. Pet. App. at 140 n.6, 149, 150. For all of these reasons, *Oregon* is important and merits consideration in this case.

the confusion and conflicts in this area of federal Indian law, fueling the prospect of additional litigation.

The central arguments of the United States are therefore closely examined for another reason. As will be seen, the United States repeatedly has made a number of important *concessions* in this Court, subsequent to *DeCoteau*, regarding the *effect of cession agreements*, like this one, on Indian reservations. These cession concessions, made in conjunction with submissions that urged the continued recognition of other original reservation boundaires, cannot be explained away. The views of the United States in this regard, submitted to this Court, merit continued consideration.

This brief also addresses, in chronological order, the specific concessions of the United States regarding the disestablishment of the 1858 Yankton Sioux reservation effected by the passage of the 1894 Yankton Sioux cession act. *Infra* at 5. In 1984, the United States formally submitted this Yankton disestablishment concession in the Eighth Circuit Court of Appeals. *United States v. Dion*, 752 F.2d 1261 (1985); *United States v. Dion*, 476 U.S. 734 (1986). The United States did so in order to maintain a cession distinction in *Solem* essential to its argument there supporting original reservation boundaries. Moreover, in other litigation also pending at the same time, and also involving the 1858 Yankton Sioux reservation and the 1894 Yankton Sioux cession act, the United States acknowledged that this Court's decision in *DeCoteau* considered "a similar and contemporaneous cession agreement" with "the same language" and "purpose." BUS, Co. Pet. App. at 166a. Significantly, Article XVIII of the 1858 treaty that the United States has now insisted is so important, was not mentioned in any of this.

ARGUMENT

A. A Review of the Arguments Previously Presented and Rejected in This Court Establishes Clear Principles That Undermine the Opinion of the Panel Majority.

> Now, this principle that Congress did not intend to disestablish the Reservations is not one that the government has made up out of *whole cloth*. It is supported both by history and by the previous decisions of this Court.

Office of Solicitor General, Tr. at 22, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

1. *Seymour v. Superintendent*, 368 U.S. 351 (1962). A disestablishment issue was first presented to this Court in *Seymour*. Although we now know that the 1906 Colville Act at issue in that case was one in a series of surplus land statutes enacted pursuant to the General Allotment Act of 1887 (Dawes Act)—a routine matter for Congress by 1906—neither the General Allotment Act of 1887 nor the limited legislative history of the 1906 Act played any real role in the resolution of the question. Act of February 8, 1887, 24 Stat. 388. The *Seymour* opinion does not cite the General Allotment Act or the legislative history of the 1906 Colville Act. The briefs are similarly silent with respect to the General Allotment Act and the few citations to the 1906 legislative history are set forth almost as an afterthought.

In short, *Seymour* was decided *almost* without the benefit of any historical perspective. "Almost" is used because, although neither the General Allotment Act nor the legislative history of the specific act in question played any role in the decision, Petitioner Seymour did rely on the contrast between the 1906 Act and the earlier 1892 "public domain" legislation that concededly disestablished the North Half of the Colville Reservation. Pet. Br. at 10, *Seymour* (No. 62). At best, this was a limited perspective, but certainly one that benefited Petitioner by simple

contrast. More important matters were not briefed, i.e. the argument that the public domain format of the 1892 Act was the result of a refusal by Congress to ratify a previously negotiated 1891 cession agreement due to the questionable nature of the title to the Colville Executive Order Reservation and the argument that the language was added to deal with a congressional concern that undesirable precedent might be established. *Antoine v. Washington*, 420 U.S. 194, 216 (1975) (Rehnquist, J., dissenting); S. Rep. No. 664, 52d Cong., 1st Sess. (1892). *See also U.S. v. Pelican*, 232 U.S. 442 (1914). In any event, it is doubtful whether any of the above would have altered the views of the United States, which argued in support of the reservation boundaries of the South Half of the Colville Reservation ("Solicitor General has urged this construction upon the Court"). *Seymour*, 368 U.S. at 357.

The Solicitor General's three page argument was based predominantly on the 1948 statutory definition of Indian country which, of course, begs the question. It was also based upon *subsequent* congressional recognition, primarily in 1956, that the reservation continued to exist. BUS, Co. Pet. App. at 3a. Neither the General Allotment Act nor the historical perspective of the 1906 Act played any role in the brief for the United States. In this light, *Seymour* concluded, without further citation, that:

> The Act did no more than *open the way for non-Indian settlers* to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Seymour, 368 U.S. at 356 (emphasis added).

The United States later seized on this statement from *Seymour* and tied it to the General Allotment Act of 1887 (which, as previously noted, was not even mentioned in *Seymour*). In effect, the United States attempted to attribute to both *Seymour* and the General Allotment Act,

a new congressional plan or purpose consistent with a new argument that no surplus land statute, passed pursuant to the General Allotment Act of 1887, was ever intended by Congress to disestablish portions of Indian Reservations—a "whole cloth" argument: the revisionist theory of the General Allotment Act.[2]

The United States focused on the General Allotment Act of 1887 for more than one reason. Prior to that time, Congress routinely utilized treaties, cession agreements and other similar arrangements, some of which contained allotment provisions, to disestablish reservations and open territories throughout the United States to settlement for decades:

> [t]he policy of the Government from its earliest days has been to restore Indian reservations or portions thereof to the public domain as the exigencies of advancing population required it. . . .

H.R. Rep. No. 791, 50th Cong., 1st Sess. at 3 (1888). No one had ever attempted to even formulate an argument that Congress never intended these actions to disestablish the limits or boundaries of Indian reservations. If similar cession agreements, passed subsequent to 1887, were not intended to have the same effect, the General Allotment Act of 1887 was the only point in history that Congress could have even arguably intended to have altered such a fundamental historical process. This is especially so in the absence of some affirmative evidence that Congress specifically intended to depart from that historical format, either generally or in a certain case. (The United States could not produce such evidence at the time—or, as a matter of fact, ever. And it will not do so in this case.) The first opportunity for the United States to advance the new revisionist theory of the General Allotment Act argument in this Court came in *Mattz v. Arnett, supra*. BUS, Co. Pet. App. at 14a-15a.

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[2] *See* the "whole cloth" disclaimer noted *supra* at 5.

2. *Mattz v. Arnett*, 412 U.S. 481 (1973). Although the United States argued forcefully for the broad sweep of *Seymour* tied to the General Allotment Act, this argument met with only limited success in *Mattz*. BUS, Co. Pet. App. at 12a-14a. The history of the Klamath River Reservation at issue in *Mattz* was so tortious and fact specific, isolated and atypical, that the *Mattz* dicta regarding the General Allotment Act, while all that the United States could have hoped for, did not really seem pivotal to the decision.

Certainly, the United States repeatedly told the *Mattz* Court:

> The Act of 1892 can properly be understood only in light of the *General Allotment Act* which Congress had recently passed.
>
> In our view, the Act of June 17, 1892, can properly be understood only in light of two considerations: (1) what Congress had done five years earlier in the *General Allotment Act*. . . .
>
> *The policy of the Act* was to continue the reservation system and the trust status of Indian land. . . .
>
> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, controlling here. . . .

BUS, Co. Pet. App. at 10a, 14a, 24a (emphasis added). *See also, id.* at 11a, 15a n.8.

And at oral argument, the United States squarely placed this issue "into a little bit of historical perspective":

> This same policy is recognized more recently by this Court in *Seymour v. Superintendent*. . . .

Tr. at 19-20, *Mattz* (No. 71-1182). *See also, id.* at 13, 14, 15, 21.

At the same time, to shore up this new General Allotment Act argument and supplement this "little bit" of historical perspective for the Court, the United States also discussed certain statutes that concededly disestablished

Indian reservations. According to the United States, the Court could, by contrast, look to these examples in determining when congressional action was really intended to disestablish an Indian reservation—an instant historical perspective. BUS, Co. Pet. App. at 18a-19a. Following Petitioner's lead in *Seymour*, and especially in light of this aspect of the *Seymour* opinion, the controlling example cited by the United States of a congressional mandated disestablishment was the 1892 *Colville* statute, where the operative language restored the north half of the reservation to the public domain. As the United States told this Court in *Mattz*, among other things:

> This Court's more recent decision in *Seymour v. Superintendent*, 368 U.S. 351, is, in our view, *controlling* here. . . . In holding that the Act did not terminate the reservation there at issue, the Court emphasized the absence from the Act of language abolishing the reservations or "restoring that land to the public domain" (368 U.S. at 355).

BUS, Co. Pet. App. at 24a (emphasis added).

Other examples were also listed by the United States to support this "by contrast" argument, including a typical cession. *Id.* at 18a-19a (the *cession* example merits special attention *infra*).

At oral argument, the United States repeated the "by contrast" point:

> MR. SACHSE . . . In closing, since I assume I am out of time, I refer the Court to page 17 of our brief where we have samples of language that Congress used when it did want to discontinue a portion of a reservation.

Tr. at 20-21, *Mattz* (No. 71-1182).

(Except for the cession example, the text *infra* establishes that the others on the list were representative of atypical situations encountered by Congress only on rare occasions and decades apart.)

Without question, the *Mattz* opinion reflects both arguments made by the United States. First, with respect to the General Allotment Act:

> Its policy was to continue the reservation system and the trust status of Indian lands, ... See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115-117, 127-129, 776-777 (1958). . . .
>
> . . . This Court unanimously observed in an analogous setting in *Seymour, id.*, at 356, . . .

Mattz, 412 U.S. at 496, 497.

Secondly, with respect to the "by contrast" argument, the Court in *Mattz* noted:

> More significantly, throughout the period from 1871-1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. . . .
>
> Congress has used clear language of express termination when that result is desired. See, for example. . . .

Id. at 504, n.22 (emphasis added).

Two years later, this Court was actually presented with a typical surplus land statute specifically patterned and enacted pursuant to the terms of the General Allotment Act. With the supporting documentation of both the specific act as well as the General Allotment Act, the General Allotment Act *dicta* in *Mattz* did not dissuade the Court, including the author of the *Mattz* opinion, from correctly concluding that surplus land statutes passed pursuant to the General Allotment Act were also intended and routinely passed by Congress to disestablish Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425, 447-449 (1975). Predictably, the United States again argued forcefully for a different result in *DeCoteau*.

3. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, the surplus land statute at issue was one of eight similar agreements in a cession format

jointly ratified in an 1891 Appropriation Act. Each of these agreements was specifically tailored to the provisions in the General Allotment Act, which had recently been passed after nearly a decade of focused debate. For these two reasons, fortuitous in retrospect, the historical record consisted of hundreds of pages directed to this aspect of the General Allotment Act (Section 5) and the effect the cession agreements were understood and intended to have.

Moreover, for the first time, all of this primary documentation was excerpted and presented to the *DeCoteau* Court in several hundred pages of briefs, setting forth a complete and proper historical perspective. That perspective established that although simple allotment per se (Section 6 of the General Allotment Act) was only intended to disestablish reservations at *some* point in the foreseeable future, a separate and distinct surplus land statute, in a cession format, opening the reservation or a portion thereof to settlement pursuant to Sec. 5 of the General Allotment Act, was intended to disestablish the affected reservation *pro tanto* (on the date of the opening set forth in the Presidential Proclamation). This was in precisely the same manner that pre-1887 cessions had disestablished reservations for decades, when Congress and/or the President authorized similar legislation.

The United States elected to ignore the force of this documentation, and instead urged the *DeCoteau* Court to recognize the continuing existence of the original reservation boundaries on the basis of *Seymour* and *Mattz* and the United States' revisionist theory of the General Allotment Act. While agreeing that the focal point of the issue had to be the General Allotment Act of 1887, the United States pressed the point that *Seymour* and *Mattz* were both openings pursuant to that act, and that no act pursuant to the General Allotment Act was ever intended to effect reservation disestablishment except at some future point in time. (Again, as in the Brief for the United States in *Mattz*, the United States blurred the distinction

between allotment per se (Section 6 of the General Allotment Act) which eventually resulted in some non-Indian ownership within the limits of Indian reservations, but was never intended to immediately disestablish the reservations, and surplus land statutes enacted pursuant to Sec. 5 of the General Allotment Act, which repeatedly accomplished this result). BUS, Co. Pet. App. at 37a, 38a, 39a, 40a.[3]

In addition, the United States submitted a series of very sophisticated arguments drawn from little scraps of language found in *Seymour* and *Mattz* to support this general proposition. No degree of sophistication, however, could overcome the problem the United States never addressed: namely, the fact that all of the contemporary historical evidence irrefutably pointed to the opposite conclusion. *DeCoteau*, 420 U.S. at 432, 434, 436, 438 and 441.

Further, the cession format utilized by Congress in previous decades—with the end result never questioned in terms of reservation boundaries—was only slightly modified at this point in time (1887 through the early 1900's). As a result, the United States could only argue that the cession format itself was probative of nothing because it was not within the list of self-serving "by contrast" examples the United States *now* said Congress utilized when Congress "clearly" intended to effectuate this result (the list noted previously was compiled by the United States and noted in *Mattz*, 412 U.S. at 497, n.19). In the original version of the list presented to the Court in *Mattz*, the United States had included representative cession language. BUS, Co. Pet. App. at 18a-19a. When that cession example did not appear in the *Mattz* opinion, the United States omitted any mention of this fact to the Court, simply adopted the *Mattz* list and argued throughout *DeCoteau* that the cession language was meaningless. *Id.* at 40a-41a.[4]

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[3] *See also*, Tr. at 11, 13, 17, 21, *Erickson v. U.S. ex rel. Feather*, (No. 73-1500), *decided with DeCoteau.*

[4] At the time, the State of South Dakota evidently overlooked this aspect of the original list and the fact that the typical cession

Even without a specific historical point of reference, it is difficult to believe that the *DeCoteau* Court would have found this argument credible when actually presented with a real cession agreement. When all of the *DeCoteau* documents conclusively established that the *DeCoteau* cession format was still the rule at this point in time *i.e.*, *after* the General Allotment Act, rather than the exception, this argument was soundly rejected. Cession terminology was "precisely suited" to disestablishment and the remainder of the sophisticated arguments of the United States were noted and rejected for that reason. *DeCoteau*, 420 U.S. at 445.[5]

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example submitted by the United States in the Brief for the United States in *Mattz* (as "direct and unambiguous language" of disestablishment) was actually ratified in the same statute as the cession agreement presented in *DeCoteau*. BUS Co. Pet. App. at 40a. To the extent that the United States was making the opposite argument in *DeCoteau*, this oversight was fortuitous for the United States in that this contradictory position was never brought to the Court's attention.

[5] As the Court in *DeCoteau* noted, as recently as 1963, the United States had joined with South Dakota in the argument that cessions disestablished reservations. Joint Brief of Respondent State of South Dakota and United States as *Amicus Curiae* at 7, *DeMarrias v. State*, 319 F.2d 845 (8th Cir. 1963) (No. 17200). *DeCoteau*, 420 U.S. at 443.

Not surprisingly, in every way that is arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau*. In fact, as Respondent Southern Missouri Waste Management District pointed out, the Yankton Commissioners repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District at 18-19. *See also* South Dakota Representative Pickler's remarks in the Congressional Record ("same kind of a treaty we have always made" . . . "procure these lands in the same way" . . . "we make no departure from our past policy" . . . "just as all other cessions of land" . . .). *Id.* at 36-37. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 9. *See generally Hagen* 510 U.S. at 412-414 (public domain).

4. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The United States subsequently resisted the force of *DeCoteau*. In 1977, in *Rosebud*, this Court considered three Sec. 5 surplus land statutes considered by Congress a decade after the *DeCoteau* surplus land statutes were passed. The United States again argued that, after adopting the General Allotment Act, Congress never intended this type of statute to disestablish portions of Indian reservations. As in the past, reliance for this argument was placed almost entirely upon *Seymour* and *Mattz*. In its brief, the United States specially emphasized that *Mattz* noted:

> Placing the 1892 Act into the historic context of *the General Allotment Act of 1887*, 24 Stat. 388, the [*Mattz*] Court further observed that the Allotment Act "permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to *continue the reservation system*. . .

BUS, Co. Pet. App. at 65a (emphasis in original text).

In its discussion of *DeCoteau*, the United States failed to mention the role played by Sec. 5 of the General Allotment Act and the cessions in the *DeCoteau* process. *Id.* According to the United States, *DeCoteau* was important primarily because of the differences between the cession act there and the *Rosebud* legislation, i.e., the unilateral nature of the congressional action in *Rosebud* and the uncertain payment in trust for the *Rosebud* land.

At oral argument, the United States repeatedly stressed its revisionist theory of the General Allotment Act. The United States maintained that after this act, Congress never intended reservation disestablishment. *DeCoteau* was mentioned only in passing and then primarily to somehow support continued reservation boundaries throughout this period. Tr. at 20, 21, 27, 29, *Rosebud* (No. 75-562).

The *Rosebud* Court proceeded, in the most definitive opinion to date, to squarely address each and every argu-

ment—sophisticated arguments to be sure (and there were many)—advanced in support of the Court restoring the original boundaries of the Rosebud Reservation. Although one or two minor exceptions might exist, a careful reading of *Rosebud*, together with *DeCoteau* as recognized historical background, establishes that the United States, the Yankton Sioux Tribe and supporting *Amici*, can not advance any argument of substance that has not already been answered. (And, as in *DeCoteau*, the public domain concept, whether expressed on the face of the act or in the legislative history, was still important in *Rosebud* and equated with reservation disestablishment.)

Unquestionably, as time went on, the cession format of the earlier period was modified, but these changes in format reflect no change in congressional intent. Thus, it ultimately mattered little that the 1904 *Rosebud* Act was technically not a "cession." As the Court in *Rosebud* explained:

> As a matter of strict English usage, petitioner is undoubtedly correct; "cession" refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign. But as Mr. Justice (then Judge) Holmes commented, we are not free to say to Congress: "We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (CA1 1908). . . .
>
> The use of the word "cession" in the 1904 Act, which was not consented to by the required extraordinary majority of the Tribe, does not make the meaning of the Act ambiguous. . .
>
> The word is technically misused but the meaning is quite clear.

Rosebud, 430 U.S. at 597.

In the instant case, of course, the word "cession" is not technically misused. And the United States' comments

regarding real cessions in *Rosebud* (alternatively, in an attempt to distinguish *Decoteau*) bear repeating now:

> The court of appeals, however, failed to recognize the *crucial difference* that in *DeCoteau* the United States itself purchased the land in the reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the reservation. 420 U.S. at 446-447.

Memorandum of the United States at 13, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562) (emphasis added).

> The 1891 Act had ratified an agreement in which the Tribe expressly *ceded* to the United States all its "right, title and interest" in the land for a lump sum. The Court contrasted this transaction with the Acts involved in *Seymour* and *Mattz*. . . . The *differences* identified by the Court are *important* to the present case. The 1891 Act was a *negotiated agreement* with the Tribe, whereas the Acts involved in *Seymour* and *Mattz* were "unilateral" Acts of Congress not agreed to by the Tribes. . . .
>
> The 1891 Act was a *straightforward cession for a sum certain in amount*. . . . These *distinctions* led to the conclusion that the Lake Traverse Reservation was extinguished and the land restored to the public domain. . . .
>
> In *DeCoteau* (but not in *Seymour* or *Mattz*) the *United States itself purchased the land in the Reservation pursuant to an agreement with the Indians; this, the Court held, restored the land to the public domain and extinguished the Reservation.*

BUS, Co. Pet. App. at 66a, 67a (emphasis added).

The United States also reminded this Court of the 1934 Interior Department Opinion which they continued to rely upon for *traditional* confirmation that real *cessions disestablished reservations*:

> In this way the *exterior boundaries* of a reservation were further reduced. The lands thereby separated from a reservation were no longer looked upon as being part of that reservation.

54 Interior Dec. 560 (1934) (emphasis added) cited and quoted in part in Memo. of the United States at 19-21 *Rosebud* (No. 75-562) and BUS, Co. Pet. App. at 79a ("The Secretary noted that many reservation lands had been ceded for a sum certain and concluded that '[t]he lands thereby separated from a reservation were no longer looked upon as being a part of that reservation'" (54 I.D. at 560)). *Id.*

It is beyond dispute that both the Sisseton and the Yankton reservation agreements are within the purview of this analysis. For this reason, as the United States pointed out, the list in the 1934 Opinion included some 26 "reservations." It did not include *either* the Sisseton or Yankton cession. BUS, Co. Pet. App. at 80a.

In oral argument, the United States reiterated, by negative implication, this same dominant point:

> [W]henever Congress *without* a binding agreement opens lands to white settlers, it does *not* pay for them and does *not* guarantee any payment but only agrees to act as trustee for future uncertain sales and leaves the property interest in the Indians—as they did in this case—that act does *not* remove the lands from the boundaries of the Reservation.

Tr. at 22, *Rosebud* (No. 75-562) (emphasis added).

A few minutes later, the same cession distinction was stressed in a different context:

> [I]n *DeCoteau*, which distinguishes both cases in a case where sale was made for a sum certain and an agreement was made, as counsel for the Tribe has discussed. . . .

Id. at 28.[6]

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[6] *See also* Rosebud Sioux Tribe's Brief in *Rosebud* that tracks this position and confirms that same understanding regarding the

5. *Solem v. Bartlett*, 465 U.S. 463 (1984). In *Solem*, the United States combined and restated so many variations of earlier arguments that even a summary review is difficult to present here. Moreover, since the United States did not participate in oral argument, that source is not available. In short, however, it can be fairly stated that the United States in *Solem* argued whatever was necessary to resist reservation disestablishment.

Most important for the present case are the concessions of the United States regarding cessions which were adopted in the Court's Opinion. *Solem*, 465 U.S. at 470, 473 n.15, 474, 476, 478. The State addresses these points. State's Br. at 9, 15-16, 26 n.15.

For example, the United States said:

> [C]*ritically different* from the situation in *DeCoteau* and *Rosebud* in at least the following respects: (1) the relevant legislation contains *no* language of "cession"; (2) there was *no* prior tribal agreement to cede the relevant area. . . .

Br. for the United States as *Amicus Curiae* Supp'ng Resp't (opposing Pet. for Cert.) at 4 n.3, *Solem* (No. 82-1253) (emphasis added).

On the merits, the cession theme was restated with unmistakable clarity:

> The *critical* question remains whether the statute invoked worked an immediate and irrevocable cession. . . .
>
> To be sure, as *DeCoteau* and *Rosebud* illustrate, there are instances in which a Reservation *must* be

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traditional view that real cessions disestablished reservations. Tribe's Brief at 12, 13 and 16, *Rosebud* (No. 75-562). Counsel for the Rosebud Sioux Tribe has decades of experience in this area of the law. At oral argument, he unequivocally stated:

> A cession is a sale. It is a high-class sale. It is a sale between sovereigns. . . . The Court assumed there was a cession. That is the fundamental error of the Court Below.

Transcript of Oral Argument at 12-13, *Rosebud*, 430 U.S. 584.

> found to have been irrevocably terminated or diminished. . . . In the climate of the times, the *only meaningful question* is whether the legislation meant to accomplish a *present, unequivocal* and *irrevocable* transfer of Reservation lands from the Tribe to the United States.
>
> The *critical* fact in all these cases is that Congress exacted a *present and total surrender of all tribal interest* in the ceded land in return for an *unconditional commitment* by the United States to an agreed payment. . . .
>
> [T]he clear line between *outright* cession and mere opening up of tribal lands was not always observed. . . . But we do not read *Rosebud* as erasing the *traditional distinction*.
>
> What is relevant, however, is that, at the end of the day, *no cession resulted*.

BUS, Co. Pet. App. at 103a, 109a, 110a, 111a, 113a, 122a (emphasis added).

In this light, it is not surprising that *Solem* repeatedly made these same cession observations.

6. *United States v. Dion*, 476 U.S. 734 (1986). In order to maintain the cession distinction essential to the argument in *Solem*, the United States had to make similar concessions in other cases then pending. As a result, at about the same time (1984), the United States recognized that cession disestablishment was the dominant factor in the history of the 1858 Yankton reservation and further, that the 1858 Yankton reservation had in fact been *disestablished* by the 1894 Yankton cession act at issue in the present case. Opening Brief for the Federal Appellant at 16, 17 n.10, *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985). This submission by the United States was made in the Eighth Circuit Court of Appeals sitting *en banc* in conjunction with the appeals of federal prosecutions of Yankton Sioux tribal members and others for unlawfully killing bald eagles, as the United States has acknowledged. Brief for the United States as *Amicus*

Curiae in Support of Plaintiffs-Appellees at 18 n.8, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

In *Dion*, in the opening brief, the United States correctly identified the relationship between the 1858 Yankton cession treaty and the 1894 Yankton cession act under a subheading disputing a treaty "right to hunt eagles to extinction" (one Yankton Sioux tribal member had allegedly killed twenty bald eagles in the course of a year). Opening Brief for the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261; Transcript at 18, 27, *Dion*, 476 U.S. 734. In addition, and in accord with the cession disestablishment submission in *Solem v. Bartlett*, 465 U.S. 463 (1984), the United States specifically cited with approval the controlling federal and state decisions that recognized and held that the 1858 Yankton reservation was disestablished by the 1894 Yankton cession act:

> In 1858, the Yankton Sioux negotiated a treaty with the United States in which they "ceded and relinquished" to the United States all but 400,000 acres of the lands claimed by them. Treaty with the Yankton Sioux, Art. I, 11 Stat. 743. (April 19, 1858)[10] . . . .[10] In 1894, Congress ratified an agreement with the Yankton Sioux which further diminished the size of their reservation. Act of August 15, 1894, § 12, 28 Stat. 286, 314. See *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980); *State v. Williamson*, 211 N.W.2d 184 (S.D. 1973).

Opening Brief of the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261.

The two disestablishment cases cited by the United States are both important. First, in *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), the parties and the federal court proceeded on the basis that the reservation had been disestablished in considering a dependent Indian community jurisdictional claim involving the City of Wagner, South Dakota, which is within the 1858 Yankton

reservation. *See* Brief of Cities at 3-6.[7] In the process of rejecting this dependent Indian community claim to preclude state jurisdiction, in *Weddell* the federal panel, without dissent, specifically noted that the disestablishment issue had been decided and conceded:

> The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell, 636 F.2d at 213 n.2.

Second, in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973), which also involved criminal offenses in the City of Wagner, South Dakota, as well as in the City of Lake Andes, South Dakota (both within the 1858 Yankton reservation), the Supreme Court of the State of South Dakota reiterated and restated its longstanding cession jurisprudence regarding "outright" cessions. Later that same month, the South Dakota Court again confirmed this cession jurisprudence and the disestablished status of a similar cession in *DeCoteau v. Dist. County Ct.*, 211 N.W.2d 843 (S.D. 1973), which was subsequently affirmed by this Court. *DeCoteau*, 420 U.S. 425 (1975).[8]

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[7] The criminal activity in *Weddell* originated in a burglary in Wagner, South Dakota, involving the theft of rifles and shotguns by several Yankton Sioux tribal members and other individuals and the armed takeover of a nearby pork plant. The Supreme Court of South Dakota decided the initial appeals in *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977). In the *Winckler* opinion, a unanimous State Supreme Court reiterated that it had previously held the Yankton reservation to be "disestablished" in *State v. Williamson*, 211 N.W.2d 182 (S.D. 1973) and further cited *DeCoteau v. Dist. County Ct.*, 211 N.W. 843 (1973), *aff'd*, 420 U.S. 425 (1975). *Winckler*, 260 N.W.2d at 360.

[8] Judge Wollman, a member of the State Supreme Court at the time, concurred specially, noting:

> [T]he Act of 1894, 28 Stat. 286, expresses a congressional determination to terminate the reservation status of the por-

Eight other briefs were filed in the Eighth Circuit Court of Appeals in *Dion*. No one disagreed with the United States' disestablishment assessment of the 1894 Yankton cession act or the controlling federal and state law.

The *en banc* majority opinion in the Eighth Circuit in *Dion* acknowledged this 1894 Yankton cession act disestablishment in the following fashion, and the dissent did not disagree with this conclusion:

> In 1858, the Yankton Sioux and the United States negotiated a treaty in which the Yankton Sioux ceded and relinquished to the United States all lands claimed by the tribe except for a four hundred thousand acre tract of land[7] . . .[7] The Supreme Court of South Dakota has determined that an act of Congress in 1894 diminished the size of the original reservation. *State v. Williamson*, 87 S.D. 512, 211 N.W.2d 182, 184 (1973); *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964). *See Weddell v. Meierhenry*, 636 F.2d 211, 213 n.2 (8th Cir. 1980).

Dion, 752 F.2d at 1263 & n.7 (8th Cir. 1985) (footnote omitted).[9]

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tion of the reservation ceded, sold, relinquished and conveyed to the United States by the Yankton Tribe.

State v. Williamson, 211 N.W.2d 182, 184 (S.D. 1973). In the instant case, Judge Wollman recused himself.

The United States has now belittled *Williamson* and all state and federal Yankton disestablishment precedent prior to "*Solem* and *Hagen*," without explaining why *Seymour*, *Mattz*, *DeCoteau* and *Rosebud* do not also figure in this equation. Brief for United States as *Amicus Curiae* in Support of Plaintiffs-Appellees at 17, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647).

[9] The *en banc* court supplemented the citations of the United States to the disestablishment cases of *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) and *State v. Williamson*, 211 N.W.2d 182 (1973) with this reference to *Wood v. Jameson*, 130 N.W.2d 95 (1964) (The court of appeals in *Weddell* had also cited *Wood*). In a habeas corpus case, the South Dakota Supreme Court in *Wood* rejected an Indian country claim of federal jurisdiction for a crime of rape that occurred in Lake Andes, South Dakota, which

State v. Williamson, 211 N.W.2d 182 (S.D. 1973); *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964) and *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980) all make clear that the 1858 Yankton reservation has been disestablished and that references to the present Yankton reservation are limited to the land still held in trust for the Yankton Sioux Tribe or tribal members. *See also DeCoteau*, 420 U.S. at 446. And it was in this light that the Solicitor General admitted in this Court that the "reservation" nature of the violations in *Dion* were "essentially undisputed." Brief for the United States at 15 n.19, *Dion*, 476 U.S. 734. *See also* Respondent's references to "Indian land" and "his reservation." Transcript at 20-21, *Dion*, 476 U.S. 734.

The opinion of this Court in *Dion* noted early on that the Eighth Circuit simply assumed that the birds were killed on the "reservation" and that the same assumption was made in this Court. *Dion*, 476 U.S. at 735 & n.1. With this assumption, a unanimous Court did not otherwise directly or specifically address the 1894 Yankton cession act issue. However, in the course of discussing the history of the 1858 Yankton reservation, the Court in *Dion* did cite *Wood* in the text of the opinion, in recognition of the fact that the area reserved in 1858 was initially a "legally constituted Indian reservation." *Dion*, 476 U.S. at 737 (citing *Wood*, 130 N.W.2d 95). *See* discussion of *Wood supra* at Note 9. On the very same page in *Wood* that recognized the initial legitimacy of the 1858 Yankton reservation, the *Wood* opinion begins its

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is within the 1858 Yankton reservation. *Wood*, 113 N.W.2d 95. The *Wood* court, citing numerous state court decisions, distinguished *Seymour v. Superintendent*, 368 U.S. 351 (1962) (as this Court did later in *DeCoteau*) on the basis of the nature of this outright 1894 cession. *Wood v. Jameson*, 130 N.W.2d at 98-99. The *Wood* court also relied on this Court's venerable precedent in *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v. United States*, 232 U.S. 478 (1914) (liquor provision to apply "on or off a reservation") and concluded that the "purpose" of Congress was to "disestablish the reservation." *Wood v. Jameson*, 130 N.W.2d at 97-99. See also discussion of *Perrin* in State's Br. at 33.

discussion of the disestablishment of the 1858 Yankton reservation occasioned by the passage of the 1894 Yankton cession act (two sentences later). *Wood*, 130 N.W. 2d at 97. As noted above, the *Wood* analysis included quotations of the cession language of the 1894 cession act and early precedent of this Court, such as *United States v. Pelican*, 232 U.S. 442 (1914) and *Perrin v. United States*, 232 U.S. 478 (1914). *Wood*, 130 N.W. 2d at 97-99. Because the Eighth Circuit in *Dion* expressly cited *Wood* for this disestablishment holding, the reference to *Wood* in this Court's opinion should be viewed in this light.

One final point with respect to the views of the United States in *Dion* regarding the 1858 Yankton treaty, the 1894 Yankton cession act and subsequent acts of Congress. Apart from the previous inconsistent disestablishment concession of the United States with reference to the 1894 Yankton cession act (and all other cessions), the strained argument the United States now submits should also be examined in the context of the views the United States expressed in *Dion* regarding statutory construction and Indian treaties generally. For example:

> [T]he general circumstances of treaty negotiation in the nineteenth century which, in our view, would not have led any of the parties even to form an intention on this issue. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), the Supreme Court emphasized that treaties with the Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." The historical context of Indian treaty negotiation demonstrates that neither the United States nor the Indian signatories ever contemplated. . . .

Opening Brief for the Federal Appellant at 17-18, *Dion*, 752 F.2d 1261.

> This Court has emphasized that Indian treaties 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.' *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

Brief for the United States at 19, *Dion*, 476 U.S. 734.

> It is, of course, axiomatic that a statute must be interpreted in light of the purposes Congress sought to achieve. See, *e.g., Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983).

Reply Brief of the United States at 7, *Dion*, 476 U.S. 734.

> The statute should be construed in order to effectuate its purposes.

Transcript at 17, *Dion*, 476 U.S. 734.

These are important concepts. Their significance is not undermined here simply because the United States now chooses to advance an argument that is at odds with acknowledged congressional assumptions and overall congressional purposes.

7. *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1986). Apart from *Dion*, the United States has only had one opportunity since *DeCoteau* (but before the present litigation) to tell this Court specifically about the *Yankton* statute and how it compared to the *DeCoteau* statute. In that instance, involving a lakebed, the cession comparison is also telling:

> [T]he United States' right to control Lakes Andes and its bed, to the exclusion of the Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement. . . . First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), slip op. at 15 n.19; *Solem v. Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering *a similar and contemporaneous cession* agreement, found that *the same language* was "precisely suited" to the purpose

> of conveying to the United States, "for a sum certain, *all of* [*the Indians'*] interest in *all* of their unallotted lands."
>
> Second, the retention of the lakebed by the Tribe would have been inconsistent with the *purposes* of the 1892 Cession Agreement. Those *purposes* consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. . . .

BUS, Co. Pet. App. at 165a, 166a (emphasis on all in original).

While it remains to be seen exactly what the United States might tell this Court now, the County would submit that in this excerpt in the 1986 Brief in Opposition, the United States has already said everything worth saying ("a similar and contemporaneous cession"). This *Yankton* lakebed litigation was pending for over a decade. Although reservation disestablishment was not decided, the Yankton cession agreement was central to the arguments for the United States and other parties. As such, it was thoroughly reviewed and discussed in all respects. At that time, Article XVIII of the Yankton agreement, viewed in context, was not noteworthy and did not even merit special attention in the argument of the United States.

Not surprisingly, the position of the United States on this issue was subsequently modified to one that now supports the recognition of the original Yankton reservation. In the court of appeals, Article XVIII figured prominently in the new argument.

8. *Hagen v. Utah*, 510 U.S. 399 (1994). *Hagen* reflects the most recent views of this Court in resolving disestablishment issues. Due to the history of the Utah legislation, the United States devoted most of its arguments in *Hagen*—naturally in favor of a recognition of original reservation boundaries—to "public domain" terminology. These arguments were generally rejected in *DeCoteau*. Again, in *Hagen* this Court squarely rejected them.

The United States also strongly argued that a cession and sum certain agreement was broadly understood to effect disestablishment:

> Language that "[e]xplicit[ly] refer[s] to *cession*" or otherwise "evidence[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress *meant to sever it* from the reservation. *Ibid.* When such language is buttressed by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." [14] [14] In the presence of both of those factors, the Court found a reservation to have been extinguished in *DeCoteau v. District County Court*, 420 U.S. 425, 431-449 (1975).
>
> But the statute at issue in *Rosebud* contained explicit language of *cession*. . . .
>
> That language does not refer to a "*cession*" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the opened land. . . . [C]ontrasts sharply with that of the statutes at issue in *DeCoteau* and *Rosebud*, the two recent cases in which the Court has found that reservation boundaries were altered by Congress. See *DeCoteau*, 420 U.S. at 445 (statute provided that the Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands," Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036); *Rosebud*, 430 U.S. at 596-597 (statute provided that Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted." Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254). In sum, the 1905 Act contains neither an "[e]xplicit reference to cession" nor any other "language evidencing the present and total surrender of all tribal interests" in the portion of the Reservation opened to non-Indian settlement. *Accordingly*, under *Solem*, it fails to demonstrate a clear congressional intention to alter the boundaries. . . . [L]an-

guage demonstrating that Congress provided for the total surrender of all tribal interests in the portions of the Reservation. . . . Act does not refer to any *cession*. . . .

As the *Rosebud* Court explained, a ruling that the Rosebud Sioux Reservation was not diminished by the 1904 Act at issue there could only have frustrated congressional intent. The statute used *unequivocal language of cession*, and adopted an agreement of the Indians that unequivocally approved the cession (albeit with modifications approved by only a simple majority of the adult male Indians). . . .

[N]one of the relevant documents . . . uses the *indisputable language of cession* that was a feature of all of the relevant documents in *Rosebud*. Moreover, in our view, the *requirement* in *Solem* that the "understanding" be "widely held" requires *proof* that the Indians shared in an understanding that alteration of the Reservation's boundaries was at hand; the *only* obvious manifestation of such an understanding on the part of the Indians is *an agreement of cession*, like the one approved in *Rosebud*.

BUS, Co. Pet. App. at 138a, 141a n.20, 142a, 143a, 149a, 150a (emphasis added).

Significantly, in this instance the United States also participated in oral argument and made explicit representations as to the effect of the use of cession language:

> MR. MANN: . . . [*T*]*he language of cession*. That seems to be—that phrase seems to be the phrase *Congress used when it intended to alter the boundaries of a reservation*.
>
> QUESTION: Well, when it intended to alter the boundaries of the reservation by cession. That much is clear.

Tr. at 26, *Hagen* (No. 92-6281).

The County certainly would not attempt to improve upon the gist of this exchange. Nothing more need be said on this point.

9. *Yankton Sioux Tribe v. Southern Missouri Waste District*, 99 F.3d 1439 (8th Cir. 1996). The United States did not participate in this litigation in the district court. In the court of appeals, the United States, as *amicus curiae*, told the court that because the federal government retains jurisdiction over Indian country generally, the continuing integrity of the exterior boundaries of Indian reservations is of "significant import." Br. of the United States at 1, *Yankton Sioux v. Southern Missouri*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647). (The United States did not contest the fact that federal jurisdiction had *not* been exercised in this area for over a century).

Moreover, the United States argued, for the first time, that it had a strong interest in protecting "the integrity of reservation boundaries" because of its "special relationship with Indian tribes." *Id.* The strength of this interest presumably overpowered any inclination to present, address, explain or defend any of the previous United States' cession arguments that were plainly inconsistent with continued reservation status, including the *Dion* disestablishment concession. The United States mentioned none of this and simply noted: "We do not agree with the arguments raised by the County in its brief. They are irrelevant to this case." *Id.* at 19 n.11.[10]

Only two points in the novel argument now advanced by the United States in support of original reservation boundaries are significant at this point in time. First, the commendable concession that this Court's 1914 Yankton decision in *Perrin v. United States*, 232 U.S. 478 (1914), "assumed" disestablishment. *Id.* at 19 n.10. And secondly,

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[10] At oral argument in the companion case of *United States v. Greger*, 98 F.3d 1080 (8th Cir. 1996), the United States glossed over the 1894 cession act because, unlike the act in *Hagen*, it did not contain probative public domain language on its face. In *Hagen*, the premise of the argument of the United States was just exactly the reverse: public domain language was meaningless, cession language would have been dispositive. *See* text at 28, *supra*.

that as late as 1985 the United States (and everyone else) was continuing to make this same assumption:

> [T]he United States stated in a footnote in its brief that, based on decisions of state courts in South Dakota, the reservation had been diminished by the 1894 treaty.

Id. at 18 n.8.

The panel majority should have been more reluctant in disregarding this venerable precedent.[11]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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[11] Another generic argument that the United States has endorsed and submitted in litigation of this kind promises even more unsettling consequences than the simple reversal of the position of the United States in regard to the 1894 Yankton cession statute. (In light of this Court's precedent, the County has every reason to believe that this Court will squarely reject the revised Yankton cession views of the United States in this case). But the new argument of the United States, submitted subsequent to *Hagen* in the Tenth Circuit and now in the Eighth Circuit Court of Appeals, summarily undermines the effect of all disestablishment precedent on reservation boundaries and would leave local jurisdictions such as Charles Mix County in almost impossible situations.

Because it is beyond the scope of this brief, others have addressed the decisions that recently endorsed this position. *See Ute Indian Tribe v. State of Utah*, 935 F. Supp. 1473 (D. Utah 1996) and *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997), where this argument recently received favorable consideration, after *40 months* of needless post-*Hagen* litigation, which is not over yet. *See* Brief of Duchesne County, Utah, and Uintah County, Utah *Amici Curiae*. The County has reproduced the argument itself as the United States submitted it in Co. App. at 1a, *infra*.

Respectfully submitted,

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APPENDIX

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Excerpt from Page 17 (Footnote 6) From Brief for United States as Amicus Curiae in Support of Plaintiff's-Appellee's, Yankton-Sioux Tribe v. Southern Missouri Waste Management Dept., 99 F. 3d 1439 (8th Cir. 1997) (95-2647).

* * * *

Article I of the 1892 Agreement provides only that "the unallotted lands within the limits the [Yankton Sioux] reservation" are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unalloted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership were removed from the Reservation. The State's argument in this case, therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see Solen*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

* * * *